Petition

81-1377

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ALEXANDER L. STEVAS,

No. .....

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

DRESSER INDUSTRIES, INC.,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Alaska denied Petitioner its right to due process under the Fourteenth Amendment to the United States Constitution by disregarding the Parties' stipulation as to the bases for the administrative regulation at issue without granting Petitioner adequate notice and an opportunity to present its defense?

2. Whether the Supreme Court of Alaska misconstrued Section 8(d) of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) by holding that federal administrative regulations and the decisions of the United States Supreme Court were not applicable to Alaska?

3. Whether Regulation 8AAC 15.100(d)(3) (Register 68, January 1979) issued by the Commission of the Department of Labor of the State of Alaska is arbitrary and capricious and thus violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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v.

STATE OF ALASKA, DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Dresser Industries, Inc., (hereinafter referred to as "Petitioner") respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Alaska (hereinafter the "Alaska Supreme Court").

OPINIONS BELOW

The Opinion of the Alaska Supreme Court is reported at 633 P.2d 998. (Appendix, hereinafter "App.", A). The Order denying Petitioner's request for a rehearing before the Alaska Supreme Court is not reported. (App. B). The Opinion of the trial court, the Superior Court of Alaska, is unreported. (App. C). The case was presented to the Superior Court on motions for summary judgment based on stipulated facts. (App. D).

JURISDICTION

The Opinion of the Alaska Supreme Court was entered on September 18, 1981. Petitioner's Petition for Rehearing was denied on October 23, 1981. (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, U. S. CONST. amend. XIV, § 1, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Other statutes involved are the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976); Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958); and Alaska Wage and Hour Act, ALASKA STAT. § 23.10.05 *et seq.* (1950). Regulations involved are 15 Fed. Reg. § 778.3(b) (1950) and Alaska Regulation 8AAC 15.100(d)(3). The pertinent portions of these statutes and regulations are found in Appendix F.

STATEMENT OF THE CASE

While employed by Petitioner, Clyde Woody was compensated according to a fluctuating workweek (hereinafter "FWW") pay plan. Under an FWW pay plan, an employee's "regular rate of pay" for the purposes of calculating overtime compensation fluctuates according to the number of hours worked in a particular pay period. In accordance with this plan, an employee receives a fixed salary for each week regardless of the number of hours worked and is paid an additional sum for each overtime hour at one-half of the amount of his "regular rate of pay". The "regular rate of pay" is computed by dividing his weekly salary by the number of hours worked in that week. The FWW plan is sanctioned under federal administrative regulations[1] and this Court's decisions[2] defining the term "regular rate of pay" contained in Section 7(a) of the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976) (hereinafter "FLSA").

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[1] 29 C.F.R. 778.114 (1981).

[2] *Rosenwasser* v. *United States*, 323 U.S. 360 (1945); *Overnight Motor Transportation Co.* v. *Missel*, 315 U.S. 572 (1941).

On December 9, 1978, the Commission of the Department of Labor of the State of Alaska (hereinafter "Commission") issued Regulation 8AAC 15.100(d) (3) (Register 68, Jan. 1979) which purported to make the FWW plan unlawful.[3] The Department of Labor brought suit in the Superior Court of Alaska on behalf of Woody for overtime compensation allegedly due. The case was submitted to the Superior Court on cross Motions for Summary Judgment based on stipulations entered into by the parties. In Stipulation Number 9, the Department of Labor agreed that the bases relied upon by the Commission in promulgating Regulation 8AAC 15.100(d)(3) were Sections 23.05.160 and 23.10.060 of the Alaska Wage and Hour Act, ALASKA STAT. § 23.10.05 *et seq.* (1950) (hereinafter "Alaska Wage and Hour Act"). (App. D). Petitioner argued that the regulation was invalid as arbitrary, capricious, and without any rational basis. Petitioner also contended that, pursuant to Section 8(d) of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) (hereinafter "Alaska Statehood Act")[4], the United States Congress had extended the FLSA, including this Court's decisions and federal regulations[5] defining "regular rate of pay," to Alaska. These

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[3] This regulation provides in pertinent part:

> (d) The following are not acceptable methods of complying with the payment of overtime provisions of A.S. 23.10.060 . . . (3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

[4] In pertinent part, Section 8(d) reads:

> (d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States.

[5] On the effective date of the Alaska Statehood Act, FWW plans were sanctioned by the definition of "regular rate of pay" contained in the regulations of the Wage and Hour Division of the U. S.

definitions are applicable to Alaska since they have not been expressly overruled by either state statute or state constitutional amendment as required by Section 8(d) of the Alaska Statehood Act. Additionally, Petitioner argued that those definitions were expressly adopted in Section 23.10.145 of the Alaska Wage and Hour Act. (App. F).

After an adverse judgment by the Superior Court, Petitioner, raising the same arguments, appealed to the Alaska Supreme Court. The Alaska Supreme Court rejected Petitioner's contention that the regulation was arbitrary and without a rational basis by disregarding Stipulation Number 9 and substituting its own basis in an effort to legitimize an otherwise invalid regulation. 633 P.2d at 1005 (App. A at 11-14). In so doing, the Alaska Supreme Court acted in callous disregard of Petitioner's rights and without granting Petitioner adequate notice or opportunity to present its defense. The Alaska Supreme Court further found that Section 8(d) of the Alaska Statehood Act extended only the FLSA statutory language and did not incorporate either the federal administrative interpretations or this Court's prior interpretation of the meaning of the term "regular rate of pay" contained in the FLSA. 633 P.2d at 1002 (App. A at 6).

In its Petition for Rehearing, Petitioner noted the Alaska Supreme Court's misinterpretation of the federal statutes as well as its deprivation of Petitioner's due process rights. (App. E). These arguments were ignored by the Alaska Supreme Court with little or no consideration and rehearing was denied. (App. B).

Department of Labor, 15 Fed. Reg. § 778.3(b) (1950) (App. F). According to Petitioner, this regulation and its superseding version, 29 C.F.R. § 778.114 (1981), were extended to Alaska.

The Alaska Supreme Court not only upheld a constitutionally defective regulation, but also arrived at this conclusion in a manner inconsistent with Petitioner's due process rights. Furthermore, its decision rested on a misinterpretation of two federal statutes, the Alaska Statehood Act and the FLSA.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF ALASKA DENIED PETITIONER ITS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DISREGARDING THE PARTIES' STIPULATION AS TO THE BASES FOR THE REGULATION AT ISSUE WITHOUT GRANTING PETITIONER NOTICE OF ITS INTENT TO DO SAME OR AN OPPORTUNITY TO PRESENT ITS DEFENSE

The Due Process Clause of the Fourteenth Amendment requires that a defendant in a civil action be given adequate notice as to the claims against him and an opportunity to be heard. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The prohibition against the arbitrary deprivation of life, liberty or property by a state applies to its courts as well as to its other branches. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930); *Robinson* v. *Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977).

Therefore, courts must grant the opportunity to be heard at a meaningful time and in a meaningful manner so that a defendant may have the opportunity to present every available defense. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Hardy* v. *Gissendaner*, 508 F.2d 1207 (5th Cir. 1975). Since the constitutional protection of due process makes no distinction between questions of law and questions of fact, due process requires an

adequate opportunity for argument as well as for the presentation of evidence. *L. B. Wilson, Inc.* v. *FCC*, 170 F.2d 793 (D.C. Cir. 1948).

The existence of the stipulation regarding the Commission's bases for the regulation provided a major focal point for Petitioner's defense at both the trial and appellate court levels. Its expectations that the case would be determined in accordance with the stipulation was consistent with fundamental principles regarding fair hearings as well as Alaska Supreme Court decisions strictly enforcing such stipulations. *See, e.g., Hilbers* v. *Municipality of Anchorage*, 611 P.2d 31 (Alaska 1980). *Storrs* v. *Lutheran Hospitals*, 609 P.2d 24 (Alaska 1980). Countless other decisions demonstrate the universally established principle that stipulations such as Stipulation Number 9 are conclusive and binding upon courts. *Kampel* v. *Commissioner*, 634 F.2d 708 (2d Cir. 1980); *City Trust Co.* v. *United States*, 497 F.2d 716 (2d Cir. 1974); *United States* v. *Lewiston Lime Co.*, 466 F.2d 1358 (9th Cir. 1972); *United States* v. *3,788.16 Acres of Land, Emmonds Co., N.D.*, 439 F.2d 291 (8th Cir. 1971). Clearly, courts have no power to make findings contrary to the terms of such stipulations. *Burstein* v. *United States*, 232 F.2d 19, 22 (8th Cir. 1956). Furthermore, this Court has rejected attempts to vitiate stipulations such as the one involved herein. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281, n. 14 (1978); *H. Hackfeld & Co.* v. *United States*, 97 U.S. 442 (1905). The Court's opinion in *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), also demonstrates the impropriety of allowing an appellate court to disregard the parties' stipulations and reflects the manifest injustice which ensues when a court imposes liability on issues outside the scope of those agreed upon by the parties.

Realizing that the stipulated bases were totally insufficient to support the regulation, the Alaska Supreme Court arbitrarily and capriciously chose to ignore the stipulation and selected an

entirely different basis in an attempt to legitimize an otherwise invalid regulation. 633 P.2d at 1005 (App. A at 12-14). Petitioner was not given any notice of the Court's intent to disregard the stipulation. Clearly, it was not given any adequate opportunity to respond to the basis selected by the Alaska Supreme Court. Had Petitioner been accorded its due process rights, it would have had an opportunity to show that the alternative basis also failed to provide any rational support for the regulation since the "hours worked" method of pay advanced by the State actually undermines the Alaska Supreme Court's public policy rationalization. Alternatively, Petitioner could have argued that, in contrast to the Alaska Supreme Court's reasoning, utilization of FWW plans is consistent with the public policy rationale since FWW plans provide an element of stabilization by guarding against an employee's loss of pay during the days not worked, a frequent occurrence in the rotational work schedules utilized in the industry. By precluding an opportunity to present such arguments, the Alaska Supreme Court violated Petitioner's due process rights. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Furthermore, due process requires that a tribunal render its decision based solely on the legal rules and evidence on the record. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 631 F.2d 1069 (3rd Cir. 1980). Thus, a decision such as that reached by the Alaska Supreme Court which is based on evidence not before the tribunal is violative of due process. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *United States* v. *Abilene and S. Railway.*, 265 U.S. 274 (1924); *Williams* v. *Tooke*, 108 F.2d 758 (5th Cir. 1940).

The Alaska Supreme Court's independent selection of an alternative basis also violated a fundamental principle of

administrative law which prohibits a reviewing court from disregarding the regulation's basis originally articulated by the agency and considering alternative rationales. *See, e.g., SEC* v. *Chenery,* 318 U.S. 80 (1943); *National Nutritional Foods Ass'n* v. *Mathews,* 557 F.2d 325 (2d Cir. 1977).

This Court has historically granted Writs of Certiorari in order to ensure that due process and the fair administration of justice are maintained. *See Fitzgerald* v. *United States Lines Co.,* 374 U.S. 16, 21 (1963); *Elkins* v. *United States,* 364 U.S. 206, 216 (1960). In view of the Alaska Supreme Court's conscious and arbitrary violation of Petitioner's due process protections, it is appropriate for this Court to grant a Writ of Certiorari in the instant case.

II.

THE ALASKA SUPREME COURT'S DECISION MISCONSTRUED THE ALASKA STATEHOOD ACT BY HOLDING THAT SECTION 8(d) OF THAT ACT DID NOT EXTEND EITHER FEDERAL ADMINISTRATIVE REGULATIONS OR THE DECISIONS OF THE UNITED STATES SUPREME COURT TO ALASKA

This Court's jurisdiction to review cases where state courts have relied upon or misconstrued federal constitutional or statutory provisions is well established. *See, e.g., Oregon* v. *Hass,* 420 U.S. 714 (1975); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 605 (1975); *Steel* v. *Louisville & N.R. Co.,* 323 U.S. 192 (1944); *Illinois Steel Co.* v. *Baltimore & O. Rd. Co.,* 320 U.S. 508 (1944); *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239 (1942).

In defense of its position that its pay scheme was lawful, Petitioner argued that the definition of "regular rate of pay" spelled out in the decisions of this Court (as well as in federal regulations) applied in Alaska by virtue of Section 8(d) of the Alaska

Statehood Act. The Alaska Supreme Court's holding that Section 8(d) had not extended to Alaska either federal judicial decisions or administrative regulations was pivotal in its rejection of Petitioner's argument. 633 P.2d 1002 (App. A, at 6).

This misinterpretation of the Alaska Statehood Act is contrary to the express language of Section 8(d) which provides for the extension to Alaska of all "territorial laws then in force" as well as all of the "laws of the United States." In construing statutory language, this Court has consistently ruled that the word "laws" includes the interpretations announced by the highest court of the land as well as legislative actions. *Warren* v. *United States*, 340 U.S. 523 (1951); *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153 (1948); *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). Moreover, once a statute is interpreted by a court, the interpretation becomes an integral part of the statute. *Guaranty Trust Co. of New York* v. *Blodgett*, 287 U.S. 509 (1932); *Gulf, C. & S.F. Ry.* v. *Moser*, 275 U.S. 133 (1927). Thus the Alaska Supreme Court's conclusion that the Alaska Statehood Act extended the statutory framework of the FLSA barren of the judicial interpretations of the United States Supreme Court is completely untenable and contrary to the decisions of this Court.

The Alaska Supreme Court's conclusion that federal regulations were not similarly extended by Section 8(d) is also erroneous as reflected by numerous decisions holding that federal rules and regulations are included in the term "laws of the United States". *United States* v. *Huass, Iowa*, 355 U.S. 570 (1958); *Chasse* v. *Chasen*, 595 F.2d 59 (1st Cir. 1979); *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir. 1976), *cert denied*, 429 U.S. 917 (1976); *Abrahams* v. *United States*, 465 F. Supp. 610 (D. N.H. 1979).

III.
REGULATION 8AAC 15.100(d)(3)(REGISTER 68, JANUARY 1979) ISSUED BY THE COMMISSION OF THE DEPARTMENT OF LABOR OF THE STATE OF ALASKA IS ARBITRARY AND CAPRICIOUS AND THUS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

It is clearly established that the Fourteenth Amendment prohibits state actions which are arbitrary and capricious. *Wilwording* v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied* 420 U.S. 912 (1975); *Jeffries* v. *Turkey Run Consolidated School Dist.*, 492 F.2d 1 (7th Cir. 1974); *Thompson* v. *Gallagher*, 489 F.2d 443 (5th Cir. 1973); *Fisher* v. *Snyder*, 476 F.2d 375 (8th Cir. 1973). It is also axiomatic that administrative regulations unsupported by a rational basis are arbitrary and capricious and, therefore, invalid. *Industrial Union Dept., AFL-CIO* v. *American Petroleum*, 448 U.S. 607 (1980); *PPG Industries, Inc.* v. *Costle*, 630 F.2d 462 (6th Cir. 1980); *United States* v. *Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977); *National Nutritional Foods Ass'n* v. *Mathews*, 557 F.2d 325 (2d Cir. 1977).

In the instant case, the Commission's bases for the regulation, as stipulated by the parties, clearly did not provide rational support. In fact, the Alaska Supreme Court so concluded, stating, "our assessment of the parties' arguments indicates that the regulation is related only tenuously, *if at all*, to [the statutory provisions stipulated as the basis]" (emphasis added).633P.2d at 1005, (App. A at 12).

In determining whether an administrative regulation is arbitrary and capricious, courts may consider only the basis articulated by the agency at the time the regulation is promulgated. *Industrial Union Dep't, AFL-CIO* v. *American Petroleum*, 448 U.S. 607 (1980); *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974); *SEC* v. *Chenery*, 318 U.S. 80 (1943); *United States* v. *Nova*

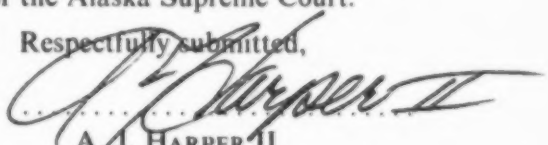
Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); *Pennzoil Co.* v. *FPC*, 534 F.2d 627 (5th Cir. 1976). Therefore, courts cannot substitute their own bases or allow agency counsel to engage in *post hoc* rationalizations by changing a regulation's basis on appeal. *SEC* v. *Chenery*, 318 U.S. 80 (1943); *National Nutritional Foods Ass'n* v. *Mathews*, 557 F.2d 325 (2d Cir. 1977). By selecting its own rationale for the regulations, the Alaska Supreme Court violated these basic tenets.

Moreover, a regulation which defines a term contrary to a statute is invalid as arbitrary and capricious. *National Nutritional Foods Ass'n* v. *Mathews, supra*. The interpretive regulation in the case before this Court clearly violated the express provisions of Section 23.10.145 of the Alaska Wage and Hour Act (App. F) which requires that the term "regular rate of pay" in that Act be defined in accordance with the FLSA and implementing federal regulations. Therefore, the regulation is clearly arbitrary and capricious and violative of due process.

CONCLUSION

The Alaska Supreme Court's construction of the Alaska Statehood Act is clearly erroneous and contrary to the decisions of this Court. Also, the regulation it attempted to legitimize is manifestly unconstitutional. Moreover, the fundamental interests in guaranteeing the fair administration of justice require that the Alaska Supreme Court's conscious disregard of Petitioner's due process rights to a fair hearing and adequate notice be remedied. For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari to review the decision of the Alaska Supreme Court.

Respectfully submitted,



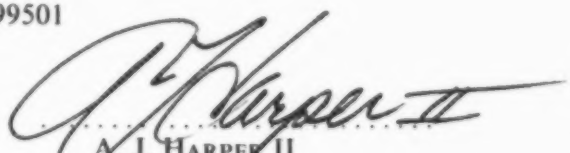
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CERTIFICATE OF SERVICE

I, A. J. Harper II, one of the attorneys for Petitioner, Dresser Industries, Inc., do hereby certify that on this the 21st day of January, 1982, three (3) copies of the foregoing petition were placed in the United States mail, postage prepaid, to the following counsel of record:

Elizabeth Page, Assistant Attorney
General of the State of Alaska
420 "L" Street, Suite 100
Anchorage, Alaska 99501



A. J. HARPER II

Appendix

THE SUPREME COURT OF THE STATE OF ALASKA

DRESSER INDUSTRIES, INC.,
Appellant,
v.
ALASKA DEPARTMENT OF LABOR,
Appellee.

File No. 5625

OPINION

[No. 2415 — September 18, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., Judge.

Appearances: John K. Norman and Wev W. Shea, Hartig, Rhodes, Norman & Mahoney, Anchorage, and A. J. Harper II and Jeffrey S. Kuhn, Fulbright & Jaworski, Houston, Texas, for Appellant. Elizabeth Page Kennedy, Assistant Attorney General, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee.

Before Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

RABINOWITZ, Chief Justice.

This is an appeal from a summary judgment granted by the superior court. Its sole issue is the validity of 8 AAC 15.100(d)(3),[1] a regulation promulgated by the Department of

[1] This regulation reads:

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

. . . .

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

Labor which prohibits the "flexible work week" (FWW),

The federal regulation referred to, 29 C.F.R. 778.114, reads as follows:

§ 778.114 *Fixed salary for fluctuating hours.*

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

purportedly under the authority of the Alaska Wage and Hour Act. The superior court concluded the regulation was valid, and Dresser Industries (Dresser) has appealed. We affirm.

The case was presented to the superior court on the basis of the parties' "Stipulations of facts, issues, and procedure," providing in part:

> 1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.
>
> 2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.
>
> 3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.
>
> 4. The court has jurisdiction of the subject matter and the parties.

(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which the full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The 'fluctuating work week' is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his 'rate of pay' at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

Dresser presented two arguments in support of its contention that 38 AAC 15.100(d)(3) is invalid. It asserted, first, that the definition of "regular rate of pay" in the federal regulations, which countenances use of the FWW, *see* note 1 *supra*, is binding upon the State Wage and Hour Division under two statutory provisions: section 8(d) of the Statehood Act[2] and the Alaska

[2] The entire text of section 8(d) of the Statehood Act reads:

Wage and Hour Act itself, specifically AS 23.10.050[3] and AS 23.10.145.[4] Second, Dresser argued that even if the State Wage and Hour Division was authorized to promulgate 28 AAC 15.100(d)(3), the regulation is inconsistent with the state Wage and Hour Act and unreasonable and arbitrary, and thus cannot withstand judicial review.

A. Carry-over of federal law.

It is undisputed that the FWW is sanctioned under federal wage and hour law. *See Overnight Motor Transport Co., Inc.* v. *Missel,* 316 U.S. 572, 86 L. Ed. 1682 (1942). Early federal regulations specifically endorsed its use, under the provisions defining "regular rate of pay." 29 C.F.R. 778.3 (1950).

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Alaska Statehood Act, P.L. 85-508, § 8(d).

[3] AS 23.10.050 reads, in relevant part: "It is the public policy of the state to . . . (2) safeguard existing minimum wage and overtime compensation standards. . . ."

[4] AS 23.10.145 reads:

Definitions. Terms used in §§ 50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

Dresser asserts that this federal definition of "regular rate of pay" carried over into state law because no change in that definition was made by the state legislature. Pointing to the section of the Statehood Act which continued in full force and effect all Territorial laws except as modified or changed by the Statehood Act itself, by the state constitution, or by the legislature of the new state, Dresser argues that coverage, meaning, and interpretation of the Alaska Act should parallel that of the Fair Labor Standards Act absent a clear legislative directive to the contrary. Dresser's position seems to be that although the state can choose to diverge from federal law in this area, it should only be able to do so by virtue of legislative enactment, and that in this action the burden is on the state to show that statutory provisions passed by the state legislature mandated issuance of the regulation at issue. Otherwise, Dresser contends, the state agency could not, merely by issuing regulations, overrule the treatment of the FWW under federal/Territorial law, carried over into state law by the Statehood Act.

We do not find this argument persuasive. We think that the text of section 8(d) of the Statehood Act made it clear that federal legislative enactments were to be carried over unless overruled by the state constitution or the state legislature.[5] We do not interpret it as having automatically incorporated and maintained federal case law or, as Dresser argues, administrative law, unless and until changed by the legislature. This court has not held itself bound by federal judicial rulings entered prior to the date of statehood, regardless of whether or not the state legislature has acted in a given area.[6] We think it would be

[5] The language of section 8(d), *see* note 2 *supra*, indicates that its primary concern was with "laws enacted by Congress."

[6] *See, e.g.*, Howarth v. Pfeifer, 443 P.2d 39, 44 (Alaska 1968) ("What may be considered a just disposition of a dispute at one stage of history may not be the same at another stage, considering changing social, economic, and other conditions of society. . . . Thus, we hold under the principles we have discussed in this opinion that

equally awkward to hold state agencies bound by federal regulations extant as of statehood. Such a result would unduly restrict state agencies and inordinately burden the legislature.

Nor are we convinced that the terms of the Alaska Wage and Hour Act evince an intent to bind the Stage Wage and Hour Division to federal regulatory definitions. It is true that AS 23.10.050 manifests an intent to safeguard "existing" minimum wage and overtime standards, but we cannot give this the strained reading of having petrified wage and hour law as of the time of its enactment. That provision is an expression of general policy, not a specific prohibition of change.

Dresser's next argument is based upon AS 23.10.145, which indicates that "[t]erms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." On its face, this provision presents a strong indication that the federal definition of "regular rate of pay" is binding on the State Wage and Hours Division. However, two other statutory provisions undercut this position. AS 23.10.085(b) provides that the state regulations to be issued by the Wage and Hour Division "may . . . define terms used in [the Alaska Wage and Hour Act]";[7] and AS 23.10.095

one may now maintain an action for negligent misrepresentation, even though that may not have been the case under the common law in years gone by."); In re Mackay, 416 P.2d 823, 837 (Alaska 1964) ("We do not agree with the respondent's contention that there should be read into Section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska. . . . Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect."). *Cf.* Surina v. Buckalew, 629 P.2d 969 (Alaska 1981) (prosecutor's non-statutorily based promise of immunity in return for testimony is binding under Alaska Constitution regardless of federal rule).

[7] AS 23.10.085 reads:

Scope of administrative regulations. (a) The director may issue, amend or rescind such administrative regulations not inconsistent

provides that the state Commissioner of Labor "may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with [the Alaska Wage and Hour Act]."[8]

We must interpret the statutory scheme as a whole and in such a way that separate provisions do not conflict.[9] Here, we agree with the state's argument that AS 23.10.145 directs the courts to apply federal regulatory definitions "where applicable," and that such definitions are "applicable" only when the state director of the Wage and Hour Division and the Commissioner of Labor have refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and 23.10.095.[10] We reject Dresser's contention that

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with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter, or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

(c) The regulations may permit deductions by an employer from the minimum wage applicable under §§ 50-150 of this chapter to his employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

[8] AS 23.10.095 reads:

Adoption of federal regulations. The commissioner may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with §§ 50-150 of this chapter.

[9] *See* In re Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978); State v. City of Anchorage, 513 P.2d 1104, 1110 (Alaska 1973).

[10] This interpretation is consistent with our ruling in McGinnis v. Stevens, 543 P.2d 1221, 1238-39 (Alaska 1975), where we held that

AS 23.10.145 is a mandatory directive to both courts and agencies, to be overruled only by the legislature. Such an interpretation would substantially nullify AS 23.10.085 and 23.10.095.

For the above reasons, we conclude that the Director was authorized to promulgate 8 AAC 15.100(d)(3).

B. Validity of 8 AAC 15.100(d)(3).

The parties have attempted to stipulate to two matters affecting the scope of this court's review: (1) that 8 AAC 15.100(d)(3) is an interpretative regulation, and thus subject to review under the independent judgment standard; and (2) that the sole statutory provisions which form the basis for the regulation are AS 23.05.160 and AS 23.10.060

Although the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court. "Counsel . . . may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them." *San*

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a prison inmate was not entitled to the minimum wage for institutional jobs. We relied partially on AS 23.10.065:

> AS 23.10.065 is based on the federal Fair Labor Standards Act of 1938 and the terms used in the Alaska statute are defined in the same as in the federal act. A prisoner is not an 'employee' of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. Moreover, even were we to regard the inmates here as employees, state employees are excluded, by virtue of AS 23.10.055(5), from the operation of the statute. Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act to cover prisoners, and we find no indication that the state statute was not meant to have parallel 'non-coverage.' We simply cannot say that the distinction between prisoners in institutions and free citizens on the labor market is suspect.

Id. (footnotes omitted). *McGinnis* did not involve a state regulation explicitly rejecting the FLSA rule on prisoners, however, so our application of the federal definition there was in accordance with our present holding.

Francisco Lumber Co. v. *Bibb*, 73 P. 864, 865 (Cal. 1903).[11] This rule regarding stipulations of law is particularly appropriate where, as here, the case involves a matter of public policy. *See generally* Annot., 92 A.L.R. 663, 666 (1934). We think these considerations require us to look beyond the parties' stipulation in our analysis of the applicable law.

We conclude that the regulation here is "quasi-legislative." In *Kelly* v. *Zamarello*, 486 P.2d 906, 909-11 (Alaska 1971) (footnotes omitted), we distinguished between quasi-legislative and interpretative rule-making:

> Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them.* * *'
>
> . . . .
>
> [T]he distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.

[11] *See also* Anchorage v. Geber, 592 P.2d 1187, 1191-92 & 1192 n.8 (Alaska 1979), where we overruled as "ill advised" that portion of Layland v. State, 535 P.2d 1043 (Alaska 1975) suggesting that parties' concessions regarding interpretations of law are binding upon the courts.

. . . .

> Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.

We think it clear that AS 23.10.085 and 23.10.095[12] constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and other terms can be applied consistently with Alaska's Wage and Hour Act. Thus, we hold that the "reasonable and not arbitrary" test is applicable.

The parties stipulated to the specific statutory provisions upon which the state relies to justify the regulation. These are AS 23.05.160,[13] which requires that an employee be informed of his rate of pay at the time of hiring and of any change in that rate

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[12] *See* notes 7 and 8 *supra*.

[13] AS 23.05.160 reads:

> *Notice of wage payments.* An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

on the payday prior to the change, and AS 23.10.060,[14] which requires the one and one-half overtime rate not only for hours worked over forty per week, but also for hours worked over eight per day.

Dresser argues that 8 AAC 15.100(d)(3) furthers neither of these statutory provisions; and indeed, our assessment of the parties' arguments indicates that the regulation is related only tenuously, if at all, to these provisions. However, the state's brief argues that the regulation is grounded in policy considerations beyond those contained in the two statutes. Although Dresser argues that this disregard of the stipulation is improper, we have concluded for the reasons noted above that the stipulation is not binding upon this court. In another case in which the parties had attempted to stipulate to the purpose of a legislative enactment, the New York Court of Appeals noted:

> We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves.

E. Fougera & Co., Inc. v. *City of New York*, 120 N.E. 642, 643 (N.Y. 1918).

The public policy underlying the Alaska statutory scheme is given as follows in AS 23.10.050:

> *Public Policy.* It is the public policy of the state to

[14] The applicable portion of AS 23.10.060 reads:

> *Payment for overtime.* No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

> (1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and
>
> (2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

On the basis of these policy pronouncements, the state argues that the basic concern of the legislature was protection of the worker's well-being against unfair wage and hour standards, and that this concern is of particular importance in Alaska, where the cost of living is higher than in other states. The state also argues that prohibiting the FWW would be to the worker's advantage, and cites the present case as an illustration: claimant Woody would be entitled to $3,956.76 if the regulation were upheld.

More specifically, the state argues that as the number of hours worked in a particular week increases, the "regular rate of pay" decreases; as the "regular rate" decreases, the resultant "overtime rate" decreases; and thus the effect of allowing the FWW is counter-productive to the stated purposes of the Act. The state insists, further, that the FWW makes it financially advantageous for an employer to hire an employee to work long overtime hours rather than to hire more workers, contrary to one purpose of the overtime provision, which was to force employers to spread employment by hiring more persons.[15]

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[15] The United States Supreme Court has repeatedly emphasized this point. In Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460, 92 L. Ed. 1502, 1514 (1948), the Court said, "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost."

We are persuaded that the state's position is correct. Under a standard hourly wage salary, as a worker's overtime hours increase, the average hourly wage increases. Under the FWW, as a worker's overtime hours increase, the average hourly wage decreases. This contravenes the policies of requiring increased overtime compensation and promoting the spreading of employment.

Thus, we must conclude that the regulation's definition of "regular rate of pay" so as to exclude use of the FWW is consistent with, and reasonably necessary to carry out, the purposes of the relevant statutory provisions. The regulation does not exceed the power delegated by the legislature. Further, 8 AAC 15.100(d)(3) is a reasonable and non-arbitrary method of furthering the statute's policies.[16]

Dresser raises several collateral arguments concerning the regulation's prohibition of the "Belo" pay plan, *see Walling* v. *A. H. Belo Corp.*, 316 U.S. 624, 86 L. Ed. 1716 (1942); 29 U.S.C.A. §207(f), and the permissibility of piece-work and commission pay plans. The validity of these provisions is not before us, and we perceive no inconsistency so blatant as to render the prohibition of the FWW unreasonable or arbitrary.

The judgment of the superior court is AFFIRMED.

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[16] The parties have not addressed, and we express no opinion concerning, the question whether there may be any conflict between 8 AAC 15.100(d)(3) and AS 23.10.060(17) and (18), enacted in ch. 31, §1, SLA 1980.

Appendix

THE SUPREME COURT OF THE STATE OF ALASKA

DRESSER INDUSTRIES, INC.,

Appellant,

v.

ALASKA DEPARTMENT OF LABOR,

Appellee.

FILE NO. 5625

MANDATE

TO: Superior Court of the State of Alaska, Third Judicial District at Anchorage.

Dresser Industries, Inc., filed an appeal from a judgment of the Superior Court, Third Judicial District at Anchorage, in Civil action no. 3AN-79-7518 entitled, "STATE OF ALASKA, DEPARTMENT OF LABOR, Plaintiff vs. DRESSER INDUSTRIES, INC., Defendant". The case was heard by this court on June 25, 1981. On September 18, 1981, the court filed its written opinion. Appellant's petition for rehearing was denied by the Court on October 23, 1981.

IT IS ORDERED:

The Judgment of the Superior Court, entered on October 15, 1980, is affirmed.

The Appellee shall recover from the Appellant attorney's fees in the amount of $500.00.

Entered by direction of the Court and pursuant to Appellate Rule 507 at Anchorage, Alaska, on October 26, 1981.

CLERK OF THE SUPREME COURT

(SEAL)

/s/ ROBERT D. BACON

Robert D. Bacon

C-1

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF LABOR,
Plaintiff,

v.

DRESSER INDUSTRIES, INC.,
Defendant.

NO. 3AN 79-7518 CIV

JUDGMENT

Pursuant to the order of this court entered October 10, 1980, after a hearing in which declaratory judgment was requested mutually by the plaintiff and defendant on the validity of 8AAC 15.100(d)(3), in which this court found that such regulation was valid and consistent with the stated policies of the Alaska Wage and Hour Act;

IT IS ORDERED that judgment be entered on behalf of the State of Alaska, Department of Labor; and

IT IS FURTHER ORDERED that, pursuant to stipulation, judgment in the amount of $3,956.76 shall be paid by defendant to plaintiff on behalf of the claimant herein.

DATED this 15th day of October, 1980.

/s/ SEABORN J. BUCKALEW, JR.
Seaborn J. Buckalew, Jr.
Superior Court Judge

Approved as to form:

/s/ WEV W. SHEA
Wev W. Shea
Co-counsel for defendant

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF LABOR,
Plaintiff.

v.

DRESSER INDUSTRIES, INC.,
Defendant.

NO. 3AN 79-7518 CIV

ORDER

AS 23.10.085(a) gives the director of the Department of Labor, Wage and Hour Division, the authority to issue administrative regulations consistent with the purposes and provisions of AS 23.10.50 through AS 23.10.150. The regulation at issue here, 8 AAC 15.100(d)(3) is entirely consistent with the stated policies of the Alaska Wage and Hours Act. AS 23.10.050.

In addition, it is clear from reading AS 23.10.085 and AS 23.10.45 together that the director has the authority to issue regulations which define the terms of the Alaska Wage and Hours Act, and that when those terms are *not* defined, the federal definitions control.

Regulation 8 AAC 15.100(d)(3) was a proper exercise of the director's authority, since the concept of a fluctuating work week is fundamentally incompatible with AS 23.10.060 and AS 23.05.160.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 10th Day of October, 1980.

/s/ S. J. BUCKALEW, JR.
S. J. Buckalew, Jr.
Superior Court Judge

D-1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF LABOR,

Plaintiff,

v.

DRESSER INDUSTRIES, INC.

Defendant.

NO. 3AN 79-7518 CIV.

STIPULATIONS OF FACTS, ISSUES AND PROCEDURE

COME NOW the parties to this action and stipulate to the following facts and issues in this case:

1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.

2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.

3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.

4. The court has jurisdiction of the subject matter and the parties.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The "fluctuating work week" is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his "rate of pay" at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

ISSUES

1. The ultimate legal issue in this case involves the validity of 8 AAC 15.100(d)(3), adopted on December 9, 1978 (Register 68, January 1979).

2. Plaintiff contends the challenged regulation was properly adopted by the Alaska Department of Labor and is within the scope of its authority and is not contrary to the provisions of the federal Fair Labor Standards Act.

3. Defendant contends that the challenged regulation is inconsistent with and contrary to the express and/or implied terms of the Fair Labor Standards Act and/or that said regulation is an arbitrary and capricious exercise of administrative authority and is void and unenforceable.

PROCEDURE

The parties agree to the following schedule for briefs and arguments on the cross-motions for summary judgment:

1. Plaintiff's brief shall be filed on or before May 2, 1980.

2. Defendant's brief shall be filed on or before June 2, 1980.

3. Plaintiff's reply brief shall be done on or before June 16, 1980. Plaintiff shall notify defendant and the court if it does not intend to file a reply brief and the case shall be decided on the initial brief plus oral argument.

4. Oral argument is requested by both parties and should be scheduled by the court as close as possible to July 1, 1980.

AVRUM M. GROSS
ATTORNEY GENERAL

DATED: ..... By .....
Elizabeth Page Kennedy
Assistant Attorney General
For Plaintiff

FULBRIGHT & JAWORSKI

DATED: ..... By .....
A. J. Harper, II
For Defendant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DRESSER INDUSTRIES, INC.,
Appellant,
v.
STATE OF ALASKA, DEPARTMENT OF LABOR,
Appellee.
SUPREME COURT NO. 5625

PETITION FOR REHEARING

COMES NOW, Dresser Industries, Appellant herein, and files this, their Petition for Rehearing in accordance with Rule 506 of the Appellate Rules of Civil Procedure. Appellant would respectfully show unto the Court the following:

I.

The Court has misconceived, or in the alternative, misapplied, the status of the definition of "regular rate of pay" under the Fair Labor Standards Act, as of the time of Alaska Statehood. (Opinion, p. 9) Prior to the time of Statehood, and the subsequent passage of the Alaska Wage and Hour Act, the term "regular rate of pay" had been interpreted and defined by the United States Supreme Court, the highest court in the land. The resulting federal administrative definition merely recognized and applied the Supreme Court's interpretation. To hold that this judicial definition does not carry over into Alaska law is clearly an overruling of *Zerbe* v. *State*, 578 P.2d 597 (Alaska 1978), rehearing, 583 P.2d 845, at 846 (1978). Furthermore, this holding undermines the foundation for the decisions of this Court in *Alaska Transportation Commission* v. *Alaska Airlines, Inc.*, 431 P.2d 510 (1976) and *Wondzell* v. *Alaska Wood Products, Inc.*, 583 P.2d 860 (1978).

II.

The Court has misconceived the general declaration of legislative intent in A.S. §23.10.145, which, as the Court apparently recognizes, is totally consistent with both the Statehood Act and the preamble of the Alaska Wage and Hour Act (Opinion, pgs. 10-12). By ruling that A.S. §23.10.085 may be invoked by the Director without consideration of or constraints from A.S. §23.10.145, the Court has effectively nullified A.S. §23.10.145, the declared intent of the Legislature, A.S. §23.10.050, and the Statehood Act, P.L. 85-508. This interpretation will allow the Director unfettered, uncontrolled discretion to act, even to the extent of overruling this Court's opinion in *McGinnes* v. *Stevens*, 543 P.2d 1221 (1975). The only construction that allows these statutory provisions to work in conjunction with one another is to recognize that A.S. §23.10.145 serves as the general parameter for administration of the Alaska Wage and Hour Act. Sections 23.10.085 and 23.10.095 operate as a basis for regulations to be issued or adopted, but only if a proposed regulation is not inconsistent with §§50-150 of the Alaska Wage and Hour Act, specifically §23.10.145 inclusive therein. See, A.S. §23.10.085(a).

III.

The Court has overlooked or misconceived a material fact, or in the alternative, misapplied a principle directly controlling in this matter by discarding the parties stipulation of fact Number 9. (Opinion, pgs. 15, 19) Appellant accepts the Court's holding that counsel cannot bind the Court to a stipulation on questions of law. However, stipulation Number 9 is one of *fact*, not law. In accordance with the Alaska Administrative Procedure Act, A.S. §44.62.200(a)(2)(3), these predicates were announced by the Director as the justification for the regulation at issue, and this factual event was so stipulated by the parties. The Court's reliance on *San Francisco Lumber Co.* v. *Bibb*, 73 P. 864, 865 (Cal. 1903) and *Anchorage* v. *Geber*, 592 P.2d 1187 (Alaska 1979) as a basis for discarding the stipulation in fact does the

opposite — these cases clearly hold a court should not disregard a *factual* stipulation.

IV.

As the Court recognized (Opinion, p. 19) the basis for the Director's action bears no rational relationship to the regulations.

(1) If the Court reaffirms that the Director can issue regulations defining terms contrary to the same term appearing in the Fair Labor Standards Act, it should at a minimum require that the basis for the Director's action be fully set forth and rationally supportable.

(2) Given the reasons advanced factually by the Director, as this Court recognized (Opinion, p. 19), no rationale basis exists for the adoption of the federal definition of "regular rate of pay" (8 ACC 15.100(a)) for all forms of compensation except the FWW and Below pay plans. This discriminatory application of the regulation has not been rationally supported and is arbitrary.

(3) The decision should be vacated and remanded to the Director for reconsideration and initiation of appropriate administrative notice and comment procedures which will satisfy judicial, administrative, and constitutional requirements. The public has a right to know the reasons for the laws which govern them, and accordingly, the Director should "provide a reasoned explanation to accompany its orders, an explanation that would reflect the factual, legal and policy foundations for the action taken." *Industrial Welfare Commission* v. *Kern County Superior Court*, 89 Lab. Cas. ¶55,273 (1980); *California Hotel and Motel Association* v. *Industrial Welfare Commission*, 25 Cal. 3d 200, n. 21 (1979).

FOR THESE REASONS, it is respectfully requested that the Petition for Rehearing be granted and the Opinion of the Court be modified as set forth under Points I, II and III above and that the Court vacate and remand to the Director for action as set forth in Point IV above.

Respectfully submitted,
/s/ A. J. HARPER II

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CERTIFICATE OF COUNSEL

In accordance with Rule 506 of the Appellate Rules of Civil Procedure, the undersigned certifies that in his judgment Appellant's Petition for Rehearing is well founded and not interposed for delay.

/s/ A. J. HARPER II
A. J. Harper II

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Petition was sent to Elizabeth Page Kennedy, Assistant Attorney General of the State of Alaska, at 420 "L" Street, Suite 100, Anchorage, Alaska 99501, by certified mail, return receipt requested, this .. day of September, 1981.

.....

JOHN K. NORMAN

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DRESSER INDUSTRIES, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF LABOR,

Appellee.

SUPREME COURT NO. 5625

PROPOSED ORDER

Having duly considered the Appellant's Petition for Rehearing, the Court orders its Opinion to be modified as set forth in Points I, II and III of the Appellant's Petition for Rehearing. As such, the decision in the Superior Court is reversed and this matter is remanded to the Director. Any further consideration of this matter by the Director must be in accordance with the guidelines in Point IV of the Petition for Rehearing.

Signed this .... day of ....., 1981.

.....

For the Court

FEDERAL STATUTES

Alaska Statehood Act, Pub. L. 85-508, § 8(d), 72 Stat. 339 (1958):

> (d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 207(a)(1)(1976) provides, in relevant part:

> . . . no employer shall employ any of his employees . . . , for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

STATE STATUTES

Alaska Wage and Hour Act, ALASKA STAT. § 23.10.05 *et seq.* (1950).

Section 23.05.160 reads:

> *Notice of wage payments.* An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

Section 23.10.060 reads, in pertinent part:

> *Payment for overtime.* No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

Section 23.10.145 reads:

> *Definitions.* Terms used in §§ 50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

REGULATIONS

FEDERAL REGULATIONS

15 Fed. Reg § 778.3(b)(1950):

> (b) The "Regular rate" under the Fair Labor Standards Act is a rate per hour. The Act does not require employers

to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission or other basis, but in such cases the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each work week. The regular hourly rate of pay of an employee is determined by dividing his total renumeration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

4. **Salaried employees; general.** If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and one-half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate . . .

5. **Salaried employees; irregular hours.** If employee earns $46.00 per week with the understanding that the salary is to cover all hours worked if his hours worked fluctuate from week to week, the regular rate of pay will vary from week to week and will be the average hourly rate each week. Suppose that during the course of four weeks the employee works 40, 46, 50 and 41 hours. His regular hourly rate of pay in each of these weeks is approximately $1.15, $1.92 and $1.12, respectively. Since the employee has already received straight time compensation on a salary basis for all hours worked, only additional half time is due.

STATE REGULATIONS

Regulation 8AAC 15.100(d) (Register 68, January 1979) provides, in pertinent part:

The following are not acceptable methods of complying with the payment of overtime provisions of § 23.10.060: (1)

guaranteed weekly pay for variable hours plan ("Belo" contracts) established under Sec. 7(f) of the Fair Labor Standards Act of 1938 . . . (3) flex-time or flexi-time plan established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1377

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DRESSER INDUSTRIES, INC.,
Petitioner,

vs.

STATE OF ALASKA, DEPARTMENT OF LABOR,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether the Supreme Court of Alaska denied Petitioner its right to due process under the Fourteenth Amendment to the United States Constitution by refusing to accept as binding the Parties' stipulation as to the bases for the administrative regulation at issue.

2. Whether the Supreme Court of Alaska misconstrued Section 8(d) of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) by holding that federal administrative regulations and the decisions of the United States Supreme Court adopted at statehood were not permanently binding on Alaska?

3. Whether Regulation 8 AAC 15.100(d)(3) (Register 68, January 1979) issued by the Commissioner of the Department of Labor of the State of Alaska is arbitrary and capricious and thus violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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No. 81-1377

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DRESSER INDUSTRIES, INC.,
Petitioner,

VS.

STATE OF ALASKA, DEPARTMENT OF LABOR,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

OPINIONS BELOW

Respondent agrees with petitioner's statement.

JURISDICTION

The Opinion of the Alaska Supreme Court was entered on September 18, 1981 (Appendix A). Petitioner's Petition for Rehearing (Appendix B) was denied on October 23, 1981 (Appendix C). Respondent disputes petitioner's statement of jurisdiction under 28 U.S.C. § 1257(3)(1976) on the grounds that no federal question of substance was raised by petitioner at the lower court level and the questions raised for the first time in this court do not confer jurisdiction on this court. (See Argument below.)

STATUTES INVOLVED

This case involves the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976); Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958); and Alaska Statutes § 23.05 *et seq.* and 23.10 *et seq.* Regulations involved are 29 C.F.R. 778.114, 15 Fed. Reg. § 778.3(b) (1950) *et seq.* and Alaskan Regulation 8 AAC 15.100(d)(3). Pertinent portions of these statutes and regulations are found in Appendix D.

STATEMENT OF THE CASE

While employed by Petitioner, Harlan Woody was compensated according to a fluctuating work week plan (hereinafter "FWW"). Under an FWW pay plan, an employee's "regular rate of pay" for purposes of calculating overtime fluctuates according to the number of hours worked in a week. A base amount for 40 hours is paid; for instance, $400 or $10 per hour. The worker would always receive $400 for the first forty hours. Under a normal overtime plan the worker would be paid $15 per hour overtime. Under FWW, the amount per hour overtime is determined by dividing the actual number of hours worked into the $400 base, then taking that new figure as a base hourly rate to figure overtime. For instance, if there were 50 hours worked, the rate would be $400 divided by 50 = $8, making time and a half = $12. The extra ten hours would be paid at the rate of $12, or $120, rather than $150. If the worker worked 55 hours, it would be $400 divided by 55 = $7.27, or $10.91 per overtime hour. The more hours worked, the less money paid per overtime hour. Under federal regulations at 29 C.F.R. 778.114 (1981), such a scheme is consistent with the federal Fair Labor Standards Act of 1938

as amended, 29 U.S.C. § 201 *et seq.* (1976) (hereinafter "FLSA"), provided the overtime hourly pay does not equal the regular hourly pay.

On December 9, 1978, the Department of Labor for the State of Alaska issued regulation 8 AAC 15.100(d) (Register 68, Jan. 1979) which made the FWW illegal in the State of Alaska. The Department subsequently brought suit in the Superior Court of Alaska on behalf of Woody for overtime compensation due. The case was submitted to the court on stipulated facts and cross motions for summary judgment. In Stipulation Number 9, the Department agreed that the bases relied upon by the Department in promulgating the regulations were AS 23.05.160 and AS 23.10.060 of the Alaska Wage and Hour Act. Petitioner argued that the regulation was invalid as arbitrary and capricious; respondent argued that the regulation was reasonable under the statutory scheme of the State of Alaska. Petitioner contended that pursuant to Section 8(d) of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) (hereinafter "Alaska Statehood Act") the United States Congress had extended the FLSA to Alaska, along with all regulations attached unless the state legislature enacted otherwise: respondent held there was a right within the FLSA itself to promulgate state regulations more stringent than and not inconsistent with the FLSA, pursuant to 29 U.S.C. § 218 (a) and 29 C.F.R. § 778.5. Additionally petitioner argued that the federal definitions were expressly adopted by AS 23.10.145 of the Alaska Wage and Hour Act; respondent argued that AS 23.10.085 (a) and (b) authorized the Department to promulgate other definitions.

After the Superior Court ruled in Respondent's favor, an appeal was taken to the Alaska Supreme Court. The Court rejected Stipulation Number 9 by holding that the stipulation was one of law, and not binding on the court, and held on other grounds that the regulation was not arbitrary and capricious under Alaska law and public policy. The Alaska Supreme Court further found that the Alaska Statehood Act did not write all adopted law into stone, and that state agencies could change regulations, particularly the Department of Labor in view of the grant of authority of 29 U.S.C. § 218 (a) and 29 C.F.R. § 778.5.

In its Petition for Rehearing, Petitioner argued that the court could reject stipulations of law, but that Stipulation Number 9 was a statement of fact. Petitioner also cited misinterpretation of law and fact. Petitioner did not raise questions of a violation of its constitutional rights to due process either under the Alaska Constitution or the U.S. Constitution. Petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

I

PETITIONER WAS GIVEN NOTICE OF THE SUPREME COURT'S INTENT TO DISREGARD STIPULATION NO. 9 AND DID HAVE AN OPPORTUNITY TO RESPOND

Dresser has argued that the parties' stipulation in the trial court to the bases for 8 AAC § 15.100(d)(3) should have been conclusive and binding upon the Alaska Supreme Court. It further argues that by disregarding the stipulation without prior notice to Dresser the court acted in violation of petitioner's rights to due process of law. Ap-

parently, the specific due process right Dresser feels was contravened is its procedural due process right to adequate notice and an opportunity for a hearing. In essence, Dresser contends that it was not given an opportunity to present arguments as to why the Supreme Court should be bound by Stipulation No. 9. *See* Petition for Certiorari at 7.

This argument ignores the fact that Dresser was not only provided with an opportunity to respond, but that it took advantage of the mechanism through which the opportunity was provided. Rule 506 of the Alaska Rules of Appellate Procedure provides that a party who feels that the Supreme Court has overlooked or misconceived a material proposition of law may petition for a rehearing. The record indicates that Dresser filed such a petition. *See* Appendix E, Petition for Certiorari. In its petition Dresser did attempt to argue that the Alaska Supreme Court had misconceived the law in holding that the stipulation was not binding. This procedure clearly afforded Dresser an ample opportunity for hearing after notice of the opinion.

To the extent Dresser is arguing that due process somehow requires stipulations regarding the law to be accepted by the courts its position is totally without foundation.[1] The great fallacy in the argument is that it assumes that litigants are as free to stipulate to the legal analysis to be applied to a given set of facts as to the facts themselves.

---

[1]Dresser's position in this regard appears to have changed as the litigation has progressed. In its Petition for Rehearing before the Alaska Supreme Court, it stated that it "accepts the Court's holding that counsel cannot bind the court to a stipulation on questions of law" and argued that the stipulation was factual in nature. *See*, Appendix E-2, Petition for Certiorari.

While parties may stipulate or admit to facts, the U.S. Supreme Court has long recognized that:

> If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative, since the court cannot be controlled by agreement of counsel on a subsidiary question of law.

Swift & Co. v. Hocking Valley Railway Co., 243 U.S. 281, 289, 37 S.Ct. 287, 289-90, 61 L.Ed. 722 (1917) cited with approval at n. 14, *Regents of University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct. 2733, 2743, 57 L.Ed.2d 750 (1978). *Accord, King v. United States*, 641 F.2d 253 (5th Cir. 1981); *Reeg v. Shaugnessy*, 570 F.2d 309 (10th Cir. 1978). *Swift & Co., supra*, is particularly instructive, for there the court ignored a stipulation as to the legal status of certain railroad tracks which had been accepted by the Supreme Court of Ohio. The court evidently did not feel that due process required it to give the parties an opportunity to provide further briefing or argument on the case after it decided to nullify the stipulation.

In view of the fact that the Alaska Supreme Court acted properly in disregarding a stipulation aimed at constraining the scope of its review and that, furthermore, Dresser had ample opportunity to attempt to persuade the court that the substance of its decision was incorrect, the dictates of due process had been met and there is no basis for granting certiorari.

II

PETITIONER FAILED TO RAISE ANY FOURTEENTH AMENDMENT CLAIMS WITHIN THE STATE COURTS

Petitioner raises two Fourteenth Amendment claims for the first time on petition to this court. First, petitioner claims that its Fourteenth Amendment rights were violated by the Alaska Supreme Court's rejection of Stipulation No. 9. The merits of this argument are covered in Section I of this response. Petitioner was given a chance to respond to the Alaska Supreme Court's decision in its Petition for Rehearing, but the issue of a Fourteenth Amendment violation was not raised by petitioner at that time. See Appendix B. The first mention of such a violation appears in the petition to this court.

Second, petitioner raises for the first time in its petition the possibility that the regulation of the respondent is violative of the Fourteenth Amendment because it is "arbitrary and capricious". Petitioner argued the "arbitrary and capricious" nature of the regulation all along within the trial courts, but did not mention the Fourteenth Amendment problem. See Appendices A through E.

If a litigant has a reasonable opportunity to raise a federal question in state court and does not do so, such a question is considered waived. *Parker v. People of State of Illinois*, 333 U.S. 571 (1948); *Michel v. State of Louisiana*, 350 U.S. 91 (1955). It has been a long standing legal maxim that the Supreme Court is not vested with jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973).

At all times, petitioner has been represented by competent legal counsel. For these reasons, this court should not consider a new federal issue raised here for the first time.

III

PETITIONER MISSTATES THE HOLDING OF THE ALASKA SUPREME COURT AS TO ITS INTERPRETATION OF THE ALASKA STATEHOOD ACT

Section 8(d) of the Alaska Statehood Act requires that all "Territorial Laws" in force were to continue in force in the new state. "Territorial laws" were defined to include laws enacted by the territorial legislature of Alaska and all laws enacted by Congress. There was a provision that such laws could be changed by the Act itself, the Alaska Constitution, or the legislature of the state. The Alaska Supreme Court held that the provision was clear, and did not intend to incorporate and maintain either federal case law or administrative law in perpetuity unless specifically changed by state legislative act.

Under a grant of authority by Congress in the FLSA in 29 U.S.C. § 218(a), the states are authorized to maintain more stringent laws than that passed by Congress. In a corollary administrative grant in 29 C.F.R. § 778.5, the United States Department of Labor authorizes other state and local laws determining "overtime compensation computed on bases different from those set forth" in the FLSA, provided they are essentially more stringent than federal requirements. Under that grant, the Alaska Supreme Court held that the Alaska Statehood Act could not bind the Alaska Department of Labor to the regulations of the U.S. Department of Labor extant at statehood. Thus, the Alaska

Supreme Court did not, as petitioner states, rule that the Alaska Statehood Act did not extend federal case law or regulations to the State of Alaska, but merely that such an extension did not "incorporate and maintain" such law "unless and until" the Alaska legislature acted. The Alaska Supreme Court held that an administrative agency, without legislative action, could promulgate regulations for the state as opposed to being required to adopt the federal regulations because of the Alaska Statehood Act. This is particularly so where the federal agency itself authorizes such local rulemaking.

CONCLUSION

Petitioner has raised three questions on appeal. Two of them are founded on the Fourteenth Amendment, an argument available to petitioner in the state courts but not raised by it. These questions should not be heard by this court because of waiver and lack of jurisdiction. In its third question, petitioner has suggested that Alaska Supreme Court misconstrued the Alaska Statehood Act when it did not, but merely outlined the clear, written limits of the Act and held it inapplicable to the regulation under consideration. For the above reasons the writ should not be granted.

Respectfully submitted,

WILSON L. CONDON
Attorney General

By: ELIZABETH PAGE KENNEDY
Assistant Attorney General

(Appendices follow)

Appendix

Appendix A

The Supreme Court of the State of Alaska

Dresser Industries, Inc.

Appellant,

v.

Alaska Department of Labor,

Appellee.

File No. 5625

OPINION

[No. 2415—September 18, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., Judge.

Appearances: John K. Norman and Wev W. Shea, Hartig, Rhodes, Norman & Mahoney, Anchorage, and A. J. Harper II and Jeffrey S. Kuhn, Fulbright & Jaworski, Houston, Texas, for Appellant. Elizabeth Page Kennedy, Assistant Attorney General, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee.

Before Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

RABINOWITZ, Chief Justice.

This is an appeal from a summary judgment granted by the superior court. Its sole issue is the validity of 8 AAC 15.100(d)(3),[1] a regulation promulgated by the Department

[1]This regulation reads:

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

. . . .

of Labor which prohibits the "flexible work week" (FWW), purportedly under the authority of the Alaska Wage and

---

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

The federal regulation referred to, 29 C.F.R. 778.114, reads as follows:

§ 778.114 *Fixed salary for fluctuating hours.*

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from

Hour Act. The superior court concluded the regulation was valid, and Dresser Industries (Dresser) has appealed. We affirm.

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week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 $250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which the full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for

The case was presented to the superior court on the basis of the parties' "Stipulations of facts, issues, and procedure," providing in part:

> 1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.
>
> 2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.
>
> 3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.
>
> 4. The court has jurisdiction of the subject matter and the parties.
>
> 5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).
>
> 6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).
>
> 7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

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overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The 'fluctuating work week' is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his 'rate of pay' at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

Dresser presented two arguments in support of its contention that 38 AAC 15.100(d)(3) is invalid. It asserted, first, that the definition of "regular rate of pay" in the federal regulations, which countenances use of the FWW, *see* note 1 *supra,* is binding upon the State Wage and Hour

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than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[2]The entire text of section 8(d) of the Statehood Act reads:

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the

Division under two statutory provisions: section 8(d) of the Statehood Act[2] and the Alaska Wage and Hour Act itself, specifically AS 23.10.050[3] and AS 23.10.145.[4] Second, Dresser argued that even if the State Wage and Hour Division was authorized to promulgate 28 AAC 15.100(d)(3), the regulation is inconsistent with the state Wage and Hour Act and unreasonable and arbitrary, and thus cannot withstand judicial review.

Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Alaska Statehood Act, P.L. 85-508, § 8(d).

[3]AS 23.10.050 reads, in relevant part: "It is the public policy of the state to . . . (2) safeguard existing minimum wage and overtime compensation standards. . . ."

[4]AS 23.10.145 reads:

Definitions. Terms used in §§ 50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

A. Carry-over of federal law.

It is undisputed that the FWW is sanctioned under federal wage and hour law. *See Overnight Motor Transport Co., Inc.* v. *Missel*, 316 U.S. 572, 86 L. Ed. 1682 (1942). Early federal regulations specifically endorsed its use, under the provisions defining "regular rate of pay." 29 C.F.R. 778.3 (1950).

Dresser asserts that this federal definition of "regular rate of pay" carried over into state law because no change in that definition was made by the state legislature. Pointing to the section of the Statehood Act which continued in full force and effect all Territorial laws except as modified or changed by the Statehood Act itself, by the state constitution, or by the legislature of the new state, Dresser argues that coverage, meaning, and interpretation of the Alaska Act should parallel that of the Fair Labor Standards Act absent a clear legislative directive to the contrary. Dresser's position seems to be that although the state can choose to diverge from federal law in this area, it should only be able to do so by virtue of legislative enactment, and that in this action the burden is on the state to show that statutory provisions passed by the state legislature mandated issuance of the regulation at issue. Otherwise, Dresser contends, the state agency could not, merely by issuing regulations, overrule the treatment of the FWW under federal/Territorial law, carried over into state law by the Statehood Act.

We do not find this argument persuasive. We think that the text of section 8(d) of the Statehood Act made it clear

that federal legislative enactments were to be carried over unless overruled by the state constitution or the state legislature.[5] We do not interpret it as having automatically incorporated and maintained federal case law or, as Dresser argues, administrative law, unless and until changed by the legislature. This court has not held itself bound by federal judicial rulings entered prior to the date of statehood, regardless of whether or not the state legislature has acted in a given area.[6] We think it would be equally awkward to hold state agencies bound by federal regulations extant as of statehood. Such a result would unduly restrict state agencies and inordinately burden the legislature.

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[5]The language of section 8(d), *see* note 2 *supra*, indicates that its primary concern was with "laws enacted by Congress."

[6]*See, e.g.*, Howarth v. Pfeifer, 443 P.2d 39, 44 (Alaska 1968) ("What may be considered a just disposition of a dispute at one stage of history may not be the same at another stage, considering changing social, economic, and other conditions of society. . . . Thus, we hold under the principles we have discussed in this opinion that one may now maintain an action for negligent misrepresentation, even though that may not have been the case under the common law in years gone by."); In re Mackay, 416 P.2d 823, 837 (Alaska 1964) ("We do not agree with the respondent's contention that there should be read into Section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska. . . . Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect.") *Cf.* Surina v. Buckalew, 629 P.2d 969 (Alaska 1981) (prosecutor's non-statutorily based promise of immunity in return for testimony is binding under Alaska Constitution regardless of federal rule).

Nor are we convinced that the terms of the Alaska Wage and Hour Act evince an intent to bind the State Wage and Hour Division to federal regulatory definitions. It is true that AS 23.10.050 manifests an intent to safeguard "existing" minimum wage and overtime standards, but we cannot give this the strained reading of having petrified wage and hour law as of the time of its enactment. That provision is an expression of general policy, not a specific prohibition of change.

Dresser's next argument is based upon AS 23.10.145, which indicates that "[t]erms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." On its face, this provision presents a strong indication that the federal definition of "regular rate of pay" is binding on the State Wage and Hours Division. However, two other statutory provisions undercut this position. AS 23.10.085(b) provides that the state regulations to be issued by the Wage and Hour Division "may . . . define terms used in [the Alaska Wage and Hour Act]",[7] and

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[7] AS 23.10.085 reads:

Scope of administrative regulations. (a) The director may issue, amend or rescind such administrative regulations not inconsistent with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter,

AS 23.10.095 provides that the state Commissioner of Labor "may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with [the Alaska Wage and Hour Act]."[8]

We must interpret the statutory scheme as a whole and in such a way that separate provisions do not conflict.[9] Here, we agree with the state's argument that AS 23.10.145 directs the courts to apply federal regulatory definitions "where applicable," and that such definitions are "applicable" only when the state director of the Wage and Hour Division and the Commissioner of Labor has refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and

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or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

(c) The regulations may permit deductions by an employer from the minimum wage applicable under §§ 50-150 of this chapter to his employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

[8]AS 23.10.095 reads:

Adoption of federal regulations. The commissioner may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with §§ 50-150 of this chapter.

[9]*See* In re Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978); State v. City of Anchorage, 513 P.2d 1104, 1110 (Alaska 1973).

23.10.095.[10] We reject Dresser's contention that AS 23.10.145 is a mandatory directive to both courts and agencies, to be overruled only by the legislature. Such an interpretation would substantially nullify AS 23.10.085 and 23.10.095.

For the above reasons, we conclude that the Director was authorized to promulgate 8 AAC 15.100(d)(3).

B. Validity of 8 AAC 15.100(d)(3).

The parties have attempted to stipulate to two matters affecting the scope of this court's review: (1) that 8 AAC 15.100(d)(3) is an interpretative regulation, and thus subject to review under the independent judgment standard;

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[10]This interpretation is consistent with our ruling in McGinnis v. Stevens, 543 P.2d 1221, 1238-39 (Alaska 1975), where we held that a prison inmate was not entitled to the minimum wage for institutional jobs. We relied on AS 23.10.065:

> AS 23.10.065 is based on the federal Fair Labor Standards Act of 1938 and the terms used in the Alaska statute are defined in the same as in the federal act. A prisoner is not an 'employee' of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. Moreover, even were we to regard the inmates here as employees, state employees are excluded, by virtue of AS 23.10.055(5), from the operation of the statute. Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act to cover prisoners, and we find no indication that the state statute was not meant to have parallel 'non-coverage.' We simply cannot say that the distinction between prisoners in institutions and free citizens on the labor market is suspect.

Id. (footnotes omitted). McGinnis did not involve a state regulation explicitly rejecting the FLSA rule on prisoners, however, so our application of the federal definition there was in accordance with our present holding.

and (2) that the sole statutory provisions which form the basis for the regulation are AS 23.05.160 and AS 23.10.060.

Although the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court. "Counsel . . . may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them." *San Francisco Lumber Co.* v. *Bibb*, 73 P. 864, 865 (Cal. 1903).[11] This rule regarding stipulations of law is particularly appropriate where, as here, the case involves a matter of public policy. *See generally* Annot., 92 A.L.R. 663, 666 (1934). We think these considerations require us to look beyond the parties' stipulation in our analysis of the applicable law.

We conclude that the regulation here is "quasi-legislative." In *Kelly* v. *Zamarello*, 486 P.2d 906, 909-11 (Alaska 1971) (footnotes omitted), we distinguished between quasi-legislative and interpretative rule-making:

> Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of

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[11] *See also* Anchorage v. Geber, 592 P.2d 1187, 1191-92 & 1192 n.8 (Alaska 1979), where we overruled as "ill advised" that portion of Layland v. State, 535 P.2d 1043 (Alaska 1975) suggesting that parties' concessions regarding interpretations of law are binding upon the courts.

legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them. * * *'

. . . .

[T]he distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.

. . . .

Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter

inquiry is proper in the review of any legislative enactment.

We think it clear that AS 23.10.085 and 23.10.095[12] constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and other terms can be applied consistently with Alaska's Wage and Hour Act. Thus, we hold that the "reasonable and not arbitrary" test is applicable.

The parties stipulated to the specific statutory provisions upon which the state relies to justify the regulation. These are AS 23.05.160,[13] which requires that an employee be informed of his rate of pay at the time of hiring and of any change in that rate on the payday prior to the change, and AS 23.10.060,[14] which requires the one and one-half

[12]*See* notes 7 and 8 *supra.*

[13]AS 23.05.160 reads:

Notice of wage payments. An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

[14]The applicable portion of AS 23.10.060 reads:

Payment for overtime. No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

overtime rate not only for hours worked over forty per week, but also for hours worked over eight per day.

Dresser argues that 8 AAC 15.100(d)(3) furthers neither of these statutory provisions; and indeed, our assessment of the parties' arguments indicates that the regulation is related only tenuously, if at all, to these provisions. However, the state's brief argues that the regulation is grounded in policy considerations beyond those contained in the two statutes. Although Dresser argues that this disregard of the stipulation is improper, we have concluded for the reasons noted above that the stipulation is not binding upon this court. In another case in which the parties had attempted to stipulate to the purpose of a legislative enactment, the New York Court of Appeals noted:

> We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves.

E. Fougera & Co., Inc. v. *City of New York*, 120 N.E. 642, 643 (N.Y. 1918).

The public policy underlying the Alaska statutory scheme is given as follows in AS 23.10.050:

> *Public Policy.* It is the public policy of the state to
>
> (1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and
>
> (2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being

> of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

On the basis of these policy pronouncements, the state argues that the basic concern of the legislature was protection of the worker's well-being against unfair wage and hours standards, and that this concern is of particular importance in Alaska, where the cost of living is higher than in other states. The state also argues that prohibiting the FWW would be to the worker's advantage, and cites the present case as an illustration; claimant Woody would be entitled to $3,956.76 if the regulation were upheld.

More specifically, the state argues that as the number of hours worked in a particular week increases, the "regular rate of pay" decreases; as the "regular rate" decreases, the resultant "overtime rate" decreases; and thus the effect of allowing the FWW is counter-productive to the stated purposes of the Act. The state insists, further, that the FWW makes it financially advantageous for an employer to hire an employee to work long overtime hours rather than to hire more workers, contrary to one purpose of the overtime provision, which was to force employers to spread employment by hiring more persons.[15]

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[15]The United States Supreme Court has repeatedly emphasized this point. In Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460, 92 L. Ed. 1502, 1514 (1948), the Court said, "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost."

We are persuaded that the state's position is correct. Under a standard hourly wage salary, as a worker's overtime hours increase, the average hourly wage increases. Under the FWW, as a worker's overtime hours increase, the average hourly wage decreases. This contravenes the policies of requiring increased overtime compensation and promoting the spreading of employment.

Thus, we must conclude that the regulation's definition of "regular rate of pay" so as to exclude use of the FWW is consistent with, and reasonably necessary to carry out, the purposes of the relevant statutory provisions. The regulation does not exceed the power delegated by the legislature. Further, 8 AAC 15.100(d)(3) is a reasonable and non-arbitrary method of furthering the statute's policies.[16]

Dresser raises several collateral arguments concerning the regulation's prohibition of the "Belo" pay plan, *see Walling* v. *A. H. Belo Corp.*, 316 U.S. 624, 86 L. Ed. 1716 (1942); 29 U.S.C.A. § 207(f), and the permissibility of piece-work and commission pay plans. The validity of these provisions is not before us, and we perceive no inconsistency so blatant as to render the prohibition of the FWW unreasonable or arbitrary.

The judgment of the superior court is AFFIRMED.

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[16]The parties have not addressed, and we express no opinion concerning, the question whether there may be any conflict between 8 AAC 15.100(d)(3) and AS 23.10.060(17) and (18), enacted in ch. 31, § 1, SLA 1980.

Appendix B

In the Supreme Court for the State of Alaska
Dresser Industries, Inc.,
Appellant,

v.

State of Alaska, Department of Labor,
Appellee.

Supreme Court No. 5625

PETITION FOR REHEARING

COMES NOW, Dresser Industries, Appellant herein, and files this, their Petition for Rehearing in accordance with Rule 506 of the Appellate Rules of Civil Procedure. Appellant would respectfully show unto the Court the following:

I.

The Court has misconceived, or in the alternative, misapplied, the status of the definition of "regular rate of pay" under the Fair Labor Standards Act, as of the time of Alaska Statehood. (Opinion, p. 9) Prior to the time of Statehood, and the subsequent passage of the Alaska Wage and Hour Act, the term "regular rate of pay" had been interpreted and defined by the United States Supreme Court, the highest court in the land. The resulting federal administrative definition merely recognized and applied the Supreme Court's interpretation. To hold that this judicial definition does not carry over into Alaska law is clearly an overruling of *Zerbe v. State*, 578 P.2d 597 (Alaska 1978), rehearing, 583 P.2d 845, at 846 (1978). Furthermore, this

holding undermines the foundation for the decisions of this Court in *Alaska Transportation Commission* v. *Alaska Airlines, Inc.*, 431 P.2d 510 (1976) and *Wondzell* v. *Alaska Wood Products, Inc.*, 583 P.2d 860 (1978).

II.

The Court has misconceived the general declaration of legislative intent in A.S. § 23.10.145, which, as the Court apparently recognizes, is totally consistent with both the Statehood Act and the preamble of the Alaska Wage and Hour Act (Opinion, pgs. 10-12). By ruling that A.S. § 23.10.085 may be invoked by the Director without consideration of or constraints from A.S. § 23.10.145, the Court has effectively nullified A.S. § 23.10.145, the declared intent of the Legislature, A.S. § 23.10.050, and the Statehood Act, P.L. 85-508. This interpretation will allow the Director unfettered, uncontrolled discretion to act, even to the extent of overruling this Court's opinion in *McGinnes* v. *Stevens*, 543 P.2d 1221 (1975). The only construction that allows these statutory provisions to work in conjunction with one another is to recognize that A.S. § 23.10.145 serves as the general parameter for administration of the Alaska Wage and Hour Act. Sections 23.10.085 and 23.10.095 operate as a basis for regulations to be issued or adopted, but only if a proposed regulation is not inconsistent with §§ 50-150 of the Alaska Wage and Hour Act, specifically § 23.10.145 inclusive therein. See, A.S. § 23.10.085(a).

III.

The Court has overlooked or misconceived a material fact, or in the alternative, misapplied a principle directly

controlling in this matter by discarding the parties stipulation of fact Number 9. (Opinion, pgs. 15, 19) Appellant accepts the Court's holding that counsel cannot bind the Court to a stipulation on questions of law. However, stipulation Number 9 is one of *fact,* not law. In accordance with the Alaska Administrative Procedure Act, A.S. § 44.62.200 (a)(2)(3), these predicates were announced by the Director as the justification for the regulation at issue, and this factual event was so stipulated by the parties. The Court's reliance on *San Francisco Lumber Co.* v. *Bibb,* 73 P. 864, 865 (Cal. 1903) and *Anchorage* v. *Geber,* 592 P.2d 1187 (Alaska 1979) as a basis for discarding the stipulation in fact does the opposite—these cases clearly hold a court should not disregard a *factual* stipulation.

IV.

As the Court recognized (Opinion, p. 19) the basis for the Director's action bears no rational relationship to the regulations.

(1) If the Court reaffirms that the Director can issue regulations defining terms contrary to the same term appearing in the Fair Labor Standards Act, it should at a minimum require that the basis for the Director's action be fully set forth and rationally supportable.

(2) Given the reasons advanced factually by the Director, as this Court recognized (Opinion, p. 19), no rationale basis exists for the adoption of the federal definition of "regular rate of pay" (8 ACC 15.100(a)) for all forms of compensation except the FWW and Belo pay plans. This discriminatory application of the regulation has not been rationally supported and is arbitrary.

(3) The decision should be vacated and remanded to the Director for reconsideration and initiation of appropriate administrative notice and comment procedures which will satisfy judicial, administrative, and constitutional requirements. The public has a right to know the reasons for the laws which govern them, and accordingly, the Director should "provide a reasoned explanation to accompany its orders, an explanation that would reflect the factual, legal and policy foundations for the action taken." *Industrial Welfare Commission* v. *Kern County Superior Court,* 89 Lab. Cas. ¶ 55,273 (1980); *California Hotel and Motel Association* v. *Industrial Welfare Commission,* 25 Cal.3d 200, n. 21 (1979).

FOR THESE REASONS, it is respectfully requested that the Petition for Rehearing be granted and the Opinion of the Court be modified as set forth under Points I, II and III above and that the Court vacate and remand to the Director for action as set forth in Point IV above.

Respectfully submitted,
/s/ A. J. HARPER II

A. J. Harper II
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CERTIFICATE OF COUNSEL

In accordance with Rule 506 of the Appellate Rules of Civil Procedure, the undersigned certifies that in his judgment Appellant's Petition for Rehearing is well founded and not interposed for delay.

/s/ A. J. HARPER II
A. J. Harper II

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Petition was sent to Elizabeth Page Kennedy, Assistant Attorney General of the State of Alaska, at 420 "L" Street, Suite 100, Anchorage, Alaska 99501, by certified mail, return receipt requested, this .... day of September, 1981.

.....
JOHN K. NORMAN

Appendix C

The Supreme Court of the State of Alaska
Dresser Industries, Inc.,
Appellant,
v.
Alaska Department of Labor,
Appellee.
File No. 5625
MANDATE

TO: Superior Court of the State of Alaska,
Third Judicial District at Anchorage.

Dresser Industries, Inc., filed an appeal from a judgment of the Superior Court, Third Judicial District at Anchorage, in Civil action no. 3AN-79-7518 entitled "STATE OF ALASKA DEPARTMENT OF LABOR, Plaintiff vs. DRESSER INDUSTRIES, INC., Defendant". The case was heard by this court on June 25, 1981. On September 18, 1981, the court filed its written opinion. Appellant's petition for rehearing was denied by the Court on October 23, 1981.

IT IS ORDERED:

The Judgment of the Superior Court, entered on October 15, 1980, is affirmed.

The Appellee shall recover from the Appellant attorney's fees in the amount of $500.00.

Entered by direction of the Court and pursuant to Appellate Rule 507 at Anchorage, Alaska, on October 26, 1981.

CLERK OF THE
SUPREME COURT

(Seal)

/s/ ROBERT D. BACON
Robert D. Bacon

Appendix D

In the Superior Court for the State of Alaska
First Judicial District at Anchorage
State of Alaska, Department of Labor,
Plaintiff,
v.
Dresser Industries, Inc.
Defendant.

No. 3AN 79-7518 Civ.

STIPULATIONS OF FACTS, ISSUES AND PROCEDURE

COME NOW the parties to this action and stipulate to the following facts and issues in this case:

1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.

2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.

3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.

4. The court has jurisdiction of the subject matter and the parties.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The "fluctuating work week" is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his "rate of pay" at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

ISSUES

1. The ultimate legal issue in this case involves the validity of 8 AAC 15.100(d)(3), adopted on December 9, 1978 (Register 68, January 1979).

2. Plaintiff contends the challenged regulation was properly adopted by the Alaska Department of Labor and is within the scope of its authority and is not contrary to the provisions of the federal Fair Labor Standards Act.

3. Defendant contends that the challenged regulation is inconsistent with and contrary to the express and/or implied terms of the Fair Labor Standards Act and/or that said regulation is an arbitrary and capricious exercise of administrative authority and is void and unenforceable.

PROCEDURE

The parties agree to the following schedule for briefs and arguments on the cross-motions for summary judgment:

1. Plaintiff's brief shall be filed on or before May 2, 1980.

2. Defendant's brief shall be filed on or before June 2, 1980.

3. Plaintiff's reply brief shall be done on or before June 16, 1980. Plaintiff shall notify defendant and the court if it does not intend to file a reply brief and the case shall be decided on the initial brief plus oral argument.

4. Oral argument is requested by both parties and should be scheduled by the court as close as possible to July 1, 1980.

AVRUM M. GROSS
ATTORNEY GENERAL

DATED: ..... By .....
Elizabeth Page Kennedy
Assistant Attorney General
For Plaintiff

FULBRIGHT & JAWORSKI

DATED: ..... By .....
A. J. Harper, II
For Defendant

Appendix E

In the Superior Court of the State of Alaska
Third Judicial District at Anchorage
State of Alaska, Department of Labor,
Plaintiff,
v.
Dresser Industries, Inc.,
Defendant.

No. 3AN 79-7518 Civ.

JUDGMENT

Pursuant to the order of this court entered October 10, 1980, after a hearing in which declaratory judgment was requested mutually by the plaintiff and defendant on the validity of 8AAC 15.100(d)(3), in which this court found that such regulation was valid and consistent with the stated policies of the Alaska Wage and Hour Act:

IT IS ORDERED that judgment be entered on behalf of the State of Alaska, Department of Labor; and

IT IS FURTHER ORDERED that, pursuant to stipulation, judgment in the amount of $3,956.76 shall be paid by defendant to plaintiff on behalf of the claimant herein.

DATED this 15th day of October, 1980.

/s/ SEABORN J. BUCKALEW, JR.
Seaborn J. Buckalew, Jr.
Superior Court Judge

Approved as to form:
/s/ WEV W. SHEA
Wev W. Shea
Co-counsel for defendant

In the Superior Court of the State of Alaska
Third Judicial District, Anchorage
State of Alaska, Department of Labor,
Plaintiff,
v.
Dresser Industries, Inc.,
Defendant.
No. 3AN 79-7518 Civ.

ORDER

AS 23.10.085(a) gives the director of the Department of Labor, Wage and Hour Division, the authority to issue administrative regulations consistent with the purposes and provisions of AS 23.10.050 through AS 23.10.150. The regulation at issue here, 8 AAC 15.100(d)(3) is entirely consistent with the stated policies of the Alaska Wage and Hour Act. AS 23.10.050.

In addition, it is clear from reading AS 23.10.085 and AS 23.10.045 together that the director has the authority to issue regulations which define the terms of the Alaska Wage and Hour Act, and that when those terms are *not* defined, the federal definitions control.

Regulation 8 AAC 15.100(d)(3) was a proper exercise of the director's authority, since the concept of a fluctuating work week is fundamentally incompatible with AS 23.10.060 and AS 23.05.160.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 10th day of October, 1980.

/s/ S. J. BUCKALEW, JR.
S. J. Buckalew, Jr.
Superior Court Judge

APPENDIX F

Federal statutes:

29 U.S.C. § 202:

(a) The Congress finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 207(a)(1):

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee

receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 218(a):

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

Alaska Statehood Act, Pub. L. 85-508, § 8(d), 72 Stat. 339 (1958):

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Terri-

torial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Federal regulations:

29 C.F.R. § 778.5:

Relations to Other Laws Generally.

Various Federal, State, and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standards Act, and the payment of overtime compensation computed on bases different from those set forth in the Fair Labor Standards Act. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations, or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws . . . Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum, for the words "regular rate at which he is employed" as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.

29 C.F.R. § 778.114(a) and (c):

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

. . .

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is suffi-

ciently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for non-overtime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

State statutes:

AS 23.05.160:

An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

AS 23.10.050:

It is the public policy of the state to

(1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and

(2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

AS 23.10.060:

No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment . . . .

AS 23.10.065:

An employer shall pay to each of his employees wages at a rate of not less than 50 cents an hour greater than the prevailing Federal Minimum Wage Law.

AS 23.10.085(a) and (b):

(a) The director may issue, amend or rescind such administrative regulations not inconsistent with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter, or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

State regulations

8 AAC 15.100:

PAYMENT FOR OVERTIME. (a) An employee's regular rate is the basis for computing overtime. The regular rate is an hourly rate figured on a weekly basis. Employees need not actually be hired at an hourly rate; they may be paid by piece-rate, salary, commission or any other basis agreeable to the employer and the employee. However, the applicable compensation basis must be converted to an hourly rate when determining the regular rate for computing overtime compensation.

(b) The regular rate referred to in (a) is that fixed hourly amount determined from an employee's hourly wage, salary, commission, piece-rate or other basis of compensation that he is to be paid for all contract hours up to the daily or weekly maximum, established under AS 23.10.060, that he is regularly employed to work during a workweek.

(c) When computing an employee's hours for the purpose of determining overtime, the employer shall count all hours the employee worked during that week including periods of "on call" and "standby or waiting time" required for the convenience of the employer which were a necessary part of the employee's performance of his employment. However, if the em-

ployee is completely relieved from all duties for a certain period during which he may use the time effectively for his own purposes, then those periods need not be counted.

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

. . .

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek. (Eff. 12/9/78, Reg. 68)